DEC 14 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 485

PERRY HALSETH, INDIVIDUALLY, AND TRADING AS PERRY SALES COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on September 15, 1954.

CITATIONS TO OPINIONS BELOW.

The Initial Decision of the Hearing Examiner of the Federal Trade Commission (R. 55) is printed in Appendix B hereto, *infra*, p. 10. The Order Denying Appeal (R. 78), and the Decision (R. 81) of the Federal Trade Commission, are printed in Appendix B hereto, *infra*, p. 16 & p. 20. The United States Court of Appeals for the Seventh Circuit entered its decision without opinion.

JURISDICTION.

The decision of the Court of Appeals for the Seventh Circuit was entered on September 15, 1954, and is printed in Appendix B hereto, *infra*, p. 28. Rehearing was denied on October 26, 1954, and is printed in Appendix B hereto, *infra*, p. 29. Final Decree was entered by the Court of Appeals on November 1, 1954, and is printed in Appendix B hereto, *infra*, p. 30. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Whether the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with the decision of this Court in the case of *United States* v. *Halseth*, 342 U. S. 277 (1952).

STATUTE INVOLVED.

The statutory provision involved is Section 5 of the Federal Trade Commission Act, 15 U. S. C. A., Section 45. It is printed in Appendix A hereto *infra*, p. 9.

STATEMENT.

Petitioner, Perry Halseth, is an individual, doing business under the name of Perry Sales Company, with office and principal place of business located at 1250 West Van Buren Street, Chicago, Illinois.

Petitioner is now, and for more than three years last past, has been engaged in the sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads, and other articles of merchandise, and has sold said items in interstate commerce.

In the course and conduct of his business in selling and distributing his merchandise, the petitioner has used and does use the following methods.

1. On some occasions he mails the following items: a form letter, a circular describing the merchandise, a sales or "push card," and order blank, and a mail return envelope addressed to petitioner.

A typical "push card" has thirty perforated discs, each of which is designated by a feminine name, and concealed within each disc is a number by which is determined the cost of each push. On the back of the card is a list of names on the discs with spaces for writing in the names of the persons who may have pushed the corresponding discs. Upon the face of the card is a large master seal under which is one of the names appearing on the discs. The seal is to be removed only after all of the discs have been sold, and the person, having pushed the disc bearing the name corresponding to the one under the seal, receives the main article of merchandise pictured on the push card and described in the circular accompanying it. In addition to this main prize there are lesser prizes, such as fountain pens, which are distributed to persons who have pushed certain other specified discs.

The typical push card has on its face the following legend and instruction:

(Picture of comforter and bedspread)

S	"Do not	S
E	Remove Seal	E
A	Until Entire	A
L	Card is Sold	L

"Numbers 1-19-22 Each Receive a $1.00 Fountain Pen."

"4 Prizes Lucky Number Under Large Red Seal Receives Choice of a Beautiful Quilted Comforter, Blanket, Bedspread or Tablecloth. Numbers 1 to 39 Pay What You Draw—Numbers Over 39 Pay Only 39¢—None Higher"

(Push out with Pencil Panel Bearing Discs)

2. On other occasions the petitioner merely uses a straight circular, without enclosing the "push card," and an order blank.

3. And at various other times, the petitioner sells to jobbers, retail stores and large firms which advertise and sell premiums.

4. The petitioner has also been a manufacturer and jobber of ballpoint pens.

On July 16, 1952, the Federal Trade Commission issued a complaint charging that the first method of selling described above, as used by petitioner, constituted unfair acts and practices within the intent and meaning of the Federal Trade Commission Act; and further charged that the said acts and practices of the petitioner were to the prejudice and injury of the public. (R. 2.)

Petitioner filed an Answer denying that he committed, or has caused to be committed, any acts which constitute unfair acts and practices within the intent and meaning of the Federal Trade Commission Act. (R. 8.) Hearings were held at Chicago, Illinois, on September 16, 1952, and at New York, New York, on October 31, 1952.

The Hearing Examiner issued his Initial Decision on January 9, 1953 (R. 55), (Appendix B hereto, *infra*, p. 10), from which decision petitioner appealed. On September 14, 1953, the Commission denied the appeal and issued its Cease and Desist Order. (R. 81.) (Appendix B hereto, *infra*, p. 20.)

On November 17, 1953, the petitioner filed a petition in the United States Court of Appeals for the Seventh Circuit (R. 87), contending that the decision of the Commission was in conflict with the decision of this Court in the case of *United States* v. *Halseth*, 342 U. S. 277 (1952). The Court of Appeals for the Seventh Circuit, on September 15, 1954, affirmed the decision of the Commission, with-

out issuing an opinion. (Appendix B hereto, *infra*, p. 28.) On October 26, 1954, the Court of Appeals denied rehearing. (Appendix B, *infra*, p. 29.) The final decree of the Court of Appeals was entered and filed on November 1, 1954. (Appendix B hereto, *infra*, p. 30.)

The Commission, in its Decision, found that the order form used by petitioner in connection with the sales method complained of contains no reference to the push card. (R. 84.) The Commission further found that upon receipt of an order properly filled out the petitioner sends out his merchandise and that petitioner has no control over the buyer and has in fact no direct means of knowing whether the buyer will retain the merchandise himself or dispose of it by use of the push card, or by some other method. (R. 84 and 85.) (Appendix B hereto, *infra*, p. 24.)

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case is in direct conflict with the decision of this Court in *United States* v. *Halseth*, 342 U. S. 277 (1952). In the *Halseth* case, this Court construed the exact same sales plan, as is in issue in this proceeding, as used by the exact same person, who is the petitioner herein, and decided that the sales plan was not a lottery or similar scheme because the lottery or similar scheme could come into existence only if the addressee put the paraphernalia he received into operation, and further that the mere mailing of the paraphernalia and instructions were not a lottery because the sender had no control over whether the addressee buyer will put the paraphernalia into operation. The Commission itself, in the instant case, found that the petitioner had no control over whether the addressee will put the paraphernalia into operation. (R. 85.) But yet, the Commission and apparently the Court below have found that

petitioner is using a sales plan involving sale and distribution of merchandise by means of chance, lottery or gift enterprise contrary to the intent and meaning of the Federal Trade Commission Act. (R. 85.) (Appendix B hereto, *infra*, p. 25.)

In its Order denying petitioner's appeal the Commission attempted to distinguish the *Halseth* case on the grounds that the *Halseth* case involved a criminal indictment for violation of postal statutes, whereas the instant case is a civil proceeding. (R. 79.) Since the court below issued no opinion, it must be assumed that it affirmed the decision of the Commission on this point. However, the language of the criminal statute (18 U. S. C., 1302) analyzed by this Court in the *Halseth* case was sweeping. The gist of the statute is the phrase "concerning any lottery." This language gives as broad a scope to the criminal statute as the phrase "unfair acts and practices in commerce" gives to Section 5 of the Federal Trade Commission Act. (Appendix A, *infra*, p. 9.) This Court gave the word "lottery" its natural meaning and found that the sales plan used by the petitioner herein was not a lottery. The decision of this Court should foreclose the jurisdiction of the Commission over the acts complained of herein. What is not a lottery in the *Halseth* case cannot become a lottery in the instant case.

This Court has considered a parallel problem in the case of *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284 (1954). In that case the Court had before it the question of whether the Federal Communications Commission could derive the power to enjoin the broadcasting of "give-away" programs from Section 1304 of the United States Criminal Code which prohibits the broadcasting of "any lottery, gift enterprise or similar scheme offering prizes dependent in whole or in

part upon lot or chance." This Court decided that the give-away programs were not lotteries. The Communications Commission argued that the case before this Court was not a criminal case but a civil suit for an injunction and therefore the statute could be given a liberal construction. This Court refused to give one construction to the statute for the Federal Communications Commission and another for the Department of Justice.

Applying the *Communications* case to the instant case, it is obvious that since this Court has decided in the *Halseth* case that the same sales plan, as is in issue in this proceeding, as used by the same petitioner, was not a lottery in a proceeding by the Department of Justice, it cannot be a lottery in a proceeding by the Federal Trade Commission.

2. The question presented is of importance in the administration of the Federal Trade Commission Act. The Commission in the instant case has usurped a function of the Post Office Department, and has acted in conflict with the decision of this Court in the *Halseth* case.

It is respectfully submitted that it is necessary for this Court to clarify the question of whether the Federal Trade Commission has the power to prohibit the acts complained of in this case after this Court has decided that the Department of Justice is without power to proscribe the same acts.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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Chicago 2, Illinois.

APPENDIX A.

The following is the material of Section 5 of the Federal Trade Commission Act (15 U. S. C. A. Sec. 45):

Sec. 5. "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, * * * or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections * * * of this article, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

The relevant portion of 18 U. S. C. 1302, provides:

"Whoever knowingly deposits in the mail, or sends or delivers by mail: any letter, package, postal card, or circulars *concerning any lottery,* or similar scheme offering prizes dependent in whole or in part, upon lot or chance; * * * shall be fined * * * or imprisoned * * *." (Italics ours.)

APPENDIX B.

BEFORE FEDERAL TRADE COMMISSION.

* * Caption—6009) * *

INITIAL DECISION.

By J. Earl Cox, Hearing Examiner.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 16, 1952, issued and subsequently served its complaint in this proceeding upon respondent Perry Halseth, individually and trading as Perry Sales Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested. Said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order.

FINDINGS AS TO THE FACTS.

Paragraph One: Respondent, Perry Halseth, is an individual trading and doing business under the name of Perry Sales Company with office and principal place of business located at 1250 West Van Buren Street in the City of Chicago, Illinois.

Respondent is now and for more than three years last past has been engaged in the sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads and other articles of merchandise and has caused said merchandise when sold to be transported from his place of business in Chicago, Illinois, to purchasers thereof located in the various other states of the United States and in the District of Columbia. Respondent's volume of business has been in excess of $1,000,000.00 per year and there is now and has been for more than three years last past a substantial course of trade by respondent in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act.

Paragraph Two: In the course and conduct of his aforesaid business in soliciting orders, selling and distributing merchandise, respondent sometimes deals directly with jobbers, retail stores and other business firms; sometimes respondent uses circulars, form letters order blanks and return envelopes in direct mail solicitation; at other times respondent uses and has used a plan of merchandising which involves or may involve the operation of games of chance, gift enterprises or lottery schemes. Under the latter plan, respondent mails to each prospective customer advertising and solicitation material consisting of a form letter, circular, order blank, push card referred to by respondent as a sales card, and return envelope, copy for all of which is prepared by respondent or under his supervision. This literature is sent out to members of the public

in great quantities—hundreds of thousands at a time—and orders are received from approximately 0.3 to 1 per cent of the total number of recipients of said literature.

The circulars describe the merchandise which respondent offers and the letter explain how, through the use of the push cards, sales can be made to "friends, relatives, neighbors and co-workers" who may obtain the merchandise offered usually "for as little as 1¢ and not more than 39¢". Prospective customers also are told that as a premium or prize for their efforts in disposing of the described merchandise through use of the push card they may receive without cost a bedspread or other article of merchandise equal in value to the main item described in the circular, plus a premium of lesser value if an order is placed with the respondent within 15 days following receipt of the offer. Fountain pens or other small articles of merchandise are often included in the merchandise offered and shipped by respondent for use as additional prizes to purchasers of chances in connection with "push" card sales.

A typical push card has thirty perforated discs each of which is designated by a feminine name, and concealed within each disc is a number by which is determined the cost of each push. On the back of the card is a list of the names on the discs with spaces for writing in the names of the persons who may have pushed the corresponding discs. Upon the face of the card is a large master seal under which is one of the names appearing on the discs. This seal is to be removed only after all the discs have been sold, and the person having pushed the disc, bearing the name corresponding to the one under the seal receives the comforter, bedspread, tablecloth, or other main article of merchandise pictured on the push card and described in the circular accompanying it. In addition to this main prize there are

lesser prizes, such as fountain pens, which are distributed to persons who have pushed certain other specified discs.

The typical push card has on its face the following legend and instruction:

(Picture of comforter and bedspread	"4 Prizes Lucky Name Under Large Red Seal Receives Choice of a Beautiful Quilted Comforter, Blanket, Bedspread or Tablecloth
S "Do Not S E Remove Seal E A Until Entire A L Card is Sold" L	Numbers 1 to 39 Pay What You Draw—Numbers Over 39 Pay Only 39¢—None Higher"
"Numbers 1-19-22 Each Receive a $1.00 Fountain Pen"	("Push out with pencil") ( ) (Panel bearing) (Discs.)

Persons having selected and paid for the lucky or winning name and numbers receive the designated articles of merchandise, without additional expense, at prices which are much less than the normal retail prices of said articles, but persons who do not select such lucky or winning name or numbers receive nothing for their money other than the privilege of making a push or punch from said card. Whether a purchaser receives an article of merchandise or nothing for the money paid, and the amount to be paid for the merchandise or the chance to receive said merchandise are thus determined wholly by lot or chance, and articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Respondent furnishes and has furnished various other similar push cards, form letters, circulars, and order blanks for use in the sale and distribution of his merchandise. The sales plan used in the sale and distribution of merchandise by means of these other push cards is the same as that hereinabove described varying only as to the mer-

chandise offered, the price of each chance and the number of chances on each card.

Paragraph Three: The order form used by respondent in connection with the aforesaid sales method contains no reference to the push card. Upon receipt of such an order properly filled out the respondent sends out his merchandise. He has no control over the buyer and has in fact no direct means of knowing whether the buyer will retain the merchandise himself or dispose of it by use of the push card or by some other method. However, the respondent does distribute push cards extensively, sends out accompanying letters describing their use, and does know that if his suggested plan is followed the merchandise shipped by him, excepting the special premiums offered the operators of the push cards, will reach the ultimate purchaser through sales made under the push card plan through the sale and purchase of the push card chances.

The record specifically establishes that some individuals have used the push cards furnished by respondent in the distribution of merchandise received from respondent. Common knowledge of human nature coupled with respondent's wide and continued use of the push cards confirms the conclusion that a substantial number of persons to whom respondent has furnished and furnishes said push cards have used and now use the same in selling and distributing respondent's merchandise in accordance with the aforementioned sales plan. Respondent thus supplies to and places in the hands of others the means and instrumentality of conducting games of chance, gift enterprises or lottery schemes in connection with the sale and distribution of his merchandise, all of which is contrary to established public policy of the Government of the United States.

Paragraph Four. The sale and distribution of merchandise in the manner above described involves games of

chance or the sale of chances to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plan or method used by respondent and by the element of chance involved therein and thereby have been and are induced to buy and sell respondent's merchandise.

The use by respondent of a sales plan or method involving sale and distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Conclusion.

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order.

It Is Ordered that respondent Perry Halseth, trading as Perry Sales Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads and other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery device or devices, which said push cards or other lottery devices are to be used or which due to their design are suitable for use in selling or

distributing said merchandise to the public by means of games of chance, gift enterprises, or lottery schemes.

2. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public push cards or any other lottery device or devices which are to be used, or which due to their design are suitable for use in the sale or distribution of respondent's merchandise to the public by means of games of chance, gift enterprises or lottery schemes.

3. Selling or otherwise disposing of any merchandise by means of or under a plan involving a game of chance, gift enterprise, or lottery scheme.

J. Earl Cox,
Hearing Examiner.

January 9, 1953

Before Federal Trade Commission.

* * (Caption—6009) * *

Commissioners:

Edward F. Howrey, Chairman.
Lowell B. Mason.
James M. Mead.
Stephen J. Spingarn.
Albert A. Carretta.

ORDER DENYING RESPONDENT'S APPEAL FROM INITIAL DECISION OF THE HEARING EXAMINER.

This matter came on to be heard by the Commission upon respondent's appeal from the initial decision of the hearing examiner herein and upon briefs and oral argument of counsel in support of and in opposition to said appeal.

Respondent contends in his appeal (1) that certain of the findings in the hearing examiner's initial decision are not based on evidence in the record and that the hearing examiner should have adopted certain findings proposed by respondent; (2) that the hearing examiner should have followed the decision in the case of *United States* v. *Halseth,* 342 U. S. 277; and (3) that the hearing examiner's conduct during the hearings was such as to deny the respondent a fair trial.

The hearing examiner's findings which respondent contends are not based on evidence in the record are:

> "* * * Common knowledge of human nature coupled with respondent's wide and continued use of the push cards confirms the conclusion that a substantial number of persons to whom respondent has furnished and furnishes said push cards have used and now use the same in selling and distributing respondent's merchandise in accordance with the aforementioned sales plan. * * *" (Paragraph Three, subparagraph two.)
>
> "Many persons are attracted by said sales plan or method used by respondent and by the element of chance involved therein. * * *" (Paragraph Four, second sentence.)
>
> "The use by respondent of a sales plan or method involving sale and distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act." (Paragraph Four, subparagraph two.)

Evidence in the record establishes that the respondent has since 1948 mailed several millions of the push cards described by the hearing examiner and that his volume of business has been in excess of one million dollars per year. Although there is no evidence showing how many of the push cards were actually used by the persons to whom they were sent in disposing of respondent's merchandise,

there is evidence that some of the push cards were used. The number of push cards so used is not material to the issues in this proceeding. Although the hearing examiner used the phrase "Common knowledge of human nature" in one of the above findings, it does not appear that he relied upon such common knowledge or that it was necessary for him to do so in reaching the conclusion that a substantial number of the persons to whom the cards were sent used the cards in selling and distributing respondent's merchandise. Respondent's sales plan or method is the same in all material respects as numerous other plans which the Commission and the courts have heretofore considered and held to be contrary to public interest and to constitute unfair acts and practices within the meaning of the Federal Trade Commission Act. The findings proposed by the respondent to the effect that the sales plan does not constitute a lottery or an enterprise of chance or any scheme injurious to the public and that respondent's acts and practices do not constitute unfair acts and practices within the meaning of the Federal Trade Commission Act are not warranted by the record, and the hearing examiner was correct in refusing to accept same.

Respondent's contention that the Supreme Court's decision in *United States* v. *Halseth, supra,* should control the disposition of this case is without merit. That case was an appeal from a criminal indictment for violation of the postal statutes and is in no way dispositive of the issues in the instant case. The question before the Court in the Halseth case was "whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme is a violation of the statute" on which the indictment was based. There was no determination that respondent's sales plan or method did not constitute unfair acts or practices in violation of the Federal Trade Commission Act.

Respondent's exceptions to the conduct of the hearing examiner are based on a comment on the record by the hearing examiner as to the import of certain testimony and the hearing examiner's refusal to grant a postponement of a scheduled hearing. It does not appear to the Commission that the hearing examiner's statement to which the respondent excepts was improper or in any manner prejudicial to the respondent. The complaint herein was served on the respondent on July 28, 1952. Said complaint informed the respondent that a hearing would be held in Chicago on September 16, 1952. By letter dated September 8, 1952, the hearing examiner notified respondent's attorney that a hearing would be held in Oshkosh, Wisconsin on September 17, 1952. Subsequently, respondent's attorney requested a postponement of the hearing scheduled to be held in Oshkosh, Wisconsin. The hearing examiner denied the request on the ground that the reason given for the inability of counsel to attend the hearing was not sufficient to justify a postponement. This was a matter within the discretion of the hearing examiner, and it does not appear to the Commission that his denial of the request was an abuse of that discretion.

The Commission having duly considered respondent's appeal and the record herein and being of the opinion that the appeal is without merit:

It Is Ordered that the respondent's appeal from the initial decision of the hearing examiner be, and it hereby is, denied.

By the Commission.

ALEX. AKERMAN, JR.,
Secretary.

(SEAL)

Issued: September 14, 1953.

E. H.
S. J. S.

BEFORE FEDERAL TRADE COMMISSION.

* * (Caption—6009) * *

Commissioners:

Edward F. Howrey, Chairman.
Lowell B. Mason.
James M. Mead.
Stephen J. Spingarn.
Albert A. Carretta.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 16, 1952, issued and subsequently served its complaint in this proceeding upon respondent Perry Halseth, individually and trading as Perry Sales Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested, and said hearing examiner, on February 9, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of

Practice, respondent filed an appeal from said initial decision and the Commission, after duly considering said appeal and the record herein, issued its order denying said appeal.

The Commission is of the opinion, however, that the initial decision of the hearing examiner is deficient in certain respects, principally in that the order therein is inconsistent with the form of order which the United States Court of Appeals for the District of Columbia Circuit has determined is appropriate in cases where the facts are essentially similar to those in this case. *Hamilton Manufacturing Co.* v. *Federal Trade Commission,* 194 F. 2d 346, and *U. S. Printing & Novelty Co.* v. *Federal Trade Commission,* CCH Trade Reg. Serv. Par. 67,502 (June 4, 1953). Therefore, the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

Findings as to the Facts.

Paragraph One: Respondent, Perry Halseth, is an individual trading and doing business under the name of Perry Sales Company with office and principal place of business located at 1250 West Van Buren Street in the City of Chicago, Illinois.

Respondent is now and for more than three years last past has been engaged in the sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads and other articles of merchandise and has caused said merchandise when sold to be transported from his place of business in Chicago, Illinois, to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent's volume of business has been

in excess of $1,000,000.00 per year and there is now and has been for more than three years last past a substantial course of trade by respondent in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act.

Paragraph Two: In the course and conduct of his aforesaid business in soliciting orders, selling and distributing merchandise, respondent sometimes deals directly with jobbers, retail stores and other business firms; sometimes respondent uses circulars, form letters, order blanks and return envelopes in direct mail solicitation; at other times respondent uses and has used a plan of merchandising which involves or may involve the operation of games of chance, gift enterprises or lottery schemes. Under the latter plan, respondent mails to each prospective customer advertising and solicitation material consisting of a form letter, circular, order blank, push card referred to by respondent as a sales card, and return envelope, copy for all of which is prepared by respondent or under his supervision. This literature is sent out to members of the public in great quantities—hundred of thousands at a time —and orders are received from approximately 0.3 to 1 percent of the total number of recipients of said literature.

The circulars describe the merchandise which respondent offers and the letters explain how, through the use of the push cards, sales can be made to "friends, relatives, neighbors and co-workers" who may obtain the merchandise offered usually "for as little as 1¢ and not more than 39¢." Prospective customers also are told that as a premium or prize for their efforts in disposing of the described merchandise through use of the push card they may receive without cost a bedspread or other article of merchandise equal in value to the main item described in the circular, plus a premium of lesser value if an order is placed with the respondent within 15 days following receipt of

the offer. Fountain pens or other small articles of merchandise are often included in the merchandise offered and shipped by respondent for use as additional prizes to purchasers of chances in connection with "push" card sales.

A typical push card has thirty perforated discs each of which is designated by a feminine name, and concealed within each disc is a number by which is determined the cost of each push. On the back of the card is a list of the names on the discs with spaces for writing in the names of the persons who may have pushed the corresponding discs. Upon the face of the card is a large master seal under which is one of the names appearing on the discs. This seal is to be removed only after all the discs have been sold and the person having pushed the disc bearing the name corresponding to the one under the seal receives the comforter, bedspread, tablecloth, or other main article of merchandise pictured on the push card and described in the circular accompanying it. In addition to this main prize there are lesser prizes, such as fountain pens, which are distributed to persons who have pushed certain other specified discs.

The typical push card has on its face the following legend and instruction:

"4 Prizes

(Picture of comforter and bedspread

S "Do Not S
E Remove Seal E
A Until Entire A
L Card is Sold" L

"Numbers 1-19-22 Each Receive a $1.00 Fountain Pen"

Lucky Name Under Large Red Seal Receives Choice of a Beautiful Quilted Comforter, Blanket, Bedspread or Tablecloth

Numbers 1 to 39 Pay What You Draw—Numbers Over 39 Pay Only 39¢—None Higher"

("Push out with pencil")
( )
(Panel bearing)
(Discs.)

Persons having selected and paid for the lucky or winning name and numbers receive the designated articles of merchandise, without additional expense, at prices which are much less than the normal retail prices of said articles, but persons who do not select such lucky or winning name or numbers receive nothing for their money other than the privilege of making a push or punch from said card. Whether a purchaser receives an article of merchandise or nothing for the money paid, and the amount to be paid for the merchandise or the chance to receive said merchandise are thus determined wholly by lot or chance, and articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Respondent furnishes and has furnished various other similar push cards, form letters, circulars, and order blanks for use in the sale and distribution of his merchandise. The sales plan used in the sale and distribution of merchandise by means of these other push cards is the same as that hereinabove described varying only as to the merchandise offered, the price of each chance and the number of chances on each card.

Paragraph Three: The order form used by respondent in connection with the aforesaid sales method contains no reference to the push card. Upon receipt of such an order properly filled out the respondent sends out his merchandise. He has no control over the buyer and has in fact no direct means of knowing whether the buyer will retain the merchandise himself or dispose of it by use of the push card or by some other method. However, the respondent does distribute push cards extensively, sends out accompanying letters describing their use, and does know that if his suggested plan is followed the merchandise shipped by him, excepting the special premiums offered the operators of the push cards, will reach the ultimate purchaser through

sales made under the push card plan through the sale and purchase of the push card chances.

The record specifically establishes that some individuals have used the push cards furnished by respondent in the distribution of merchandise received from respondent. Respondent's wide and continued use of the push cards confirms the conclusion that a substantial number of persons to whom respondent has furnished and furnishes said push cards have used and now use the same in selling and distributing respondent's merchandise in accordance with the aforementioned sales plan. Respondent thus supplies to and places in the hands of others the means and instrumentality of conducting games of chance, gift enterprises or lottery schemes in connection with the sale and distribution of his merchandise, all of which is contrary to established public policy of the Government of the United States.

Paragraph Four: The sale and distribution of merchandise in the manner above described involves games of chance or the sale of chances to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plan or method used by respondent and by the element of chance involved therein and thereby have been and are induced to buy and sell respondent's merchandise.

The use by respondent of a sales plan or method involving sale and distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Conclusion.

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order.

It Is Ordered that respondent Perry Halseth, trading as Perry Sales Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery device or devices which are designed or intended to be used in selling or distributing said merchandise to the public by means of games of chance, gift enterprises, or lottery schemes.

2. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, push cards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondent's merchandise to the public by means of games of chance, gift enterprises or lottery schemes.

3. Selling or otherwise disposing of any merchandise by means of or under a plan involving a game of chance, gift enterprise, or lottery scheme.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon him of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

By the Commission.

ALEX. AKERMAN, JR.,
Secretary.

(SEAL)

Issued: September 14, 1953.

E. H.
A. A. C.
S. J. S.
L. B. M.
J. M. M.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, September 15, 1954.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

No. 11022.

PERRY HALSETH, Individually, and trading as PERRY SALES CO., *Petitioner*, *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition to Review an Order of the Federal Trade Commission.

Now this day come the parties by their counsel, and this cause comes on to be heard on the Petition for Review of an Order of the Federal Trade Commission, and the certified transcript of record and briefs of counsel, and on oral argument by Mr. Robert A. Simon, counsel for petitioner, and by Mr. James E. Corkey, counsel for respondent.

On consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the Federal Trade Commission on September 14, 1953, be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, October 26, 1954.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

No. 11022.

PERRY HALSETH, Individually, and trading as PERRY SALES CO., *Petitioner*, *vs.* FEDERAL TRADE COMMISSION, *Respondent.*	Petition for Review of an Order of the Federal Trade Commission.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

PERRY HALSETH, individually and trading as PERRY SALES COMPANY, *Petitioner*,

vs.

FEDERAL TRADE COMMISSION, *Respondent*.

No. 11022

November 1, 1954.

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST.

Perry Halseth, individually and trading as Perry Sales Company, having filed in this Court on November 17, 1953, his petition to review and set aside an order to cease and desist issued against him on September 14, 1953, in a proceeding before the said respondent entitled "In the matter of Perry Halseth, individually and trading as Perry Sales Company, Docket No. 6009"; and a copy of said petition having been served upon the respondent; and the respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument; and this Court having thereafter fully considered the matter and having rendered its decision on September 15, 1954, affirming said order to cease and desist:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the aforesaid petition to review be, and the same hereby is, dismissed, and that the said order to cease and desist be, and it hereby is, affirmed and enforced and petitioner is hereby commanded to obey said order to cease and desist and to comply therewith.

AND IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that within ninety (90) days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which he has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

/s/ F. RYAN DUFFY
/s/ J. EARL MAJOR
/s/ ELMER J. SCHNACKENBERG
United States Circuit Judges.

Entered.
A true copy.
Teste:

KENNETH J. CARRICK,
(Seal) *Clerk United States Court of Appeals for the Seventh Circuit.*

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 485

PERRY HALSETH, INDIVIDUALLY AND TRADING AS PERRY SALES COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The Court of Appeals for the Seventh Circuit affirmed and enforced the order of the Federal Trade Commission without opinion. The decision and order of the Commission are printed at Pet. 20–27.

JURISDICTION

The decision of the court of appeals was rendered on September 15, 1954 (Pet. 28), rehearing

was denied on October 26, 1954 (Pet. 29), and a final decree was entered on November 1, 1954 (Pet. 30–31). The petition for a writ of certiorari was filed on December 14, 1954. Jurisdiction is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether petitioner's method of doing business—distributing merchandise to solicited representatives throughout the United States, together with "push-card" devices prepared and designed to enable the representatives to sell the items of merchandise by lottery—is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The essential facts, as found by the Commission after full hearing, may be summarized as follows:

Petitioner is engaged in selling cameras, radios, pens, dolls, cutlery, and bedspreads through representatives located in all parts of the United States. These representatives are solicited by advertising material which petitioner sends through the mails in great quantities. The advertising packet consists, *inter alia,* of a circular describing various articles of merchandise offered, a "push-card" device, and an order blank. The recipient is advised that the "push-card" may be utilized to obtain the advertised articles as premiums, while giving an opportunity to "friends, neighbors and co-workers" to obtain the merchandise "for as little as 1¢ and not more than 39¢."

The typical "push-card" pictures the item of merchandise involved and holds thirty perforated disks, each bearing a feminine name and each concealing a number determinative of the cost of each draw. A patron drawing a number between 1 and 39 is charged the amount in cents of the number drawn; if the number is over 39, the cost is 39¢. Certain numbers entitle the drawer to the prize of a ballpoint fountain pen. A master seal on the card conceals the "lucky name" (one of the feminine names on the disks) entitling the holder of the corresponding disk to the merchandise prize. These devices, when employed

in conformity with petitioner's instructions, result in the conduct of a game of chance, gift enterprise or lottery scheme. They have been used in this manner by a substantial number of persons engaged in distributing petitioner's merchandise. (Pet. 11–15.)

On the basis of these facts, the Commission concluded that petitioner was engaging in unfair acts and practices within Section 5 of the Federal Trade Commission Act, and issued a cease and desist order (Pet. 26–27). On petition to review, the court of appeals affirmed the order and directed its enforcement (Pet. 30–31).

ARGUMENT

Federal Trade Commission v. *Keppel and Bro., Inc.*, 291 U. S. 304, established that it is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act to use a selling scheme under which the purchaser's payment or the return which he receives depends upon chance.[1] This doctrine has been applied by the courts of appeals in a wide variety of situations which have in common the use of a device designed to promote sales through appeal to customers' gambling instincts.[2] Patently, there is nothing to

[1] Petitioner's "push-cards," as noted above, make both payment and return a gamble.

[2] *Minter* v. *Federal Trade Commission*, 102 F. 2d 69 (C. A. 3); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F. 2d 444 (C. A. 3); *Consolidated Manufacturing Co.* v. *Federal Trade Commission*, 199 F. 2d 417 (C. A. 4); *Hill* v. *Federal Trade Commission*, 124 F. 2d 104 (C. A. 5);

distinguish petitioner's scheme from the schemes and devices proscribed in numerous predecessor cases.

Chas. A. Brewer & Sons v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6); *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), certiorari denied, 299 U. S. 557; *Federal Trade Commission* v. *A. McLean & Son*, 84 F. 2d 910 (C. A. 7), certiorari denied, 299 U. S. 590; *Chicago Silk Co.* v. *Federal Trade Commission*, 90 F. 2d 689 (C. A. 7), certiorari denied, 302 U. S. 753; *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (C. A. 7), certiorari denied, 308 U. S. 610; *Koolish* v. *Federal Trade Commission*, 129 F. 2d 64 (C. A. 7), certiorari denied, 317 U. S. 683; *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C. A. 7), certiorari denied, 321 U. S. 791; *Johnson Candy Co.* v. *Federal Trade Commission*, 78 F. 2d 717 (C. A. 7); *Kritzik* v. *Federal Trade Commission*, 125 F. 2d 351 (C. A. 7); *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564 (C. A. 7); *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C. A. 8), certiorari denied, 301 U. S. 691; *Loughran* v. *Federal Trade Commission*, 143 F. 2d 431 (C. A. 8); *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519 (C. A. 8); *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C. A. 9), certiorari denied, 344 U. S. 819; *Feitler* v. *Federal Trade Commission*, 201 F. 2d 790 (C. A. 9), certiorari denied, 346 U. S. 814; *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C. A. 9); *Lee Boyer's Candy* v. *Federal Trade Commission*, 128 F. 2d 261 (C. A. 9); *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (C. A. 9); *Ostler Candy Co.* v. *Federal Trade Commission*, 106 F. 2d 962 (C. A. 10), certiorari denied, 309 U. S. 675; *Universal Manufacturing Co.* v. *Federal Trade Commission*, 204 F. 2d 272 (C. A. 10), certiorari denied, 346 U. S. 856; *Gay Games, Inc.* v. *Federal Trade Commission*, 204 F. 2d 197 (C. A. 10); *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, 204 F. 2d 737 (C. A. D. C.), certiorari denied, 346 U. S. 830; *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C.); *Seymour Sales Co.* v. *Federal Trade Commission* (C. A. D. C., November 26, 1954), pending on petition for certiorari, No. 484, this Term.

Petitioner argues, however, that the Commission is precluded from applying the doctrine of the *Keppel* case in this instance because of *United States* v. *Halseth,* 342 U. S. 277, which held that petitioner's distribution of the advertising material containing the "push-card" device did not violate the criminal statute (18 U. S. C. 1302) prohibiting the mailing of matter "concerning any lottery, gift enterprise, or similar screme."[3]

But that decision held that the original act of mailing the advertising material did not violate the criminal statute since the statute applied only to an "existing, going lottery or gambling scheme," and the "lottery or scheme would come into existence only if the addressee put the paraphernalia into operation." 342 U. S. at 280–281. Whether the initial act of petitioner in setting the scheme in operation violates a criminal statute is immaterial. This Court ruled in the *Keppel* case that the sale of merchandise by offering it to the public on a gambling basis is "unfair" within the meaning of the Federal Trade Commission Act, irrespective of whether particular acts involved in such conduct come within the "criminal statutes imposing penalties on gambling, lotteries and the like." 291 U. S. at 313.

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[3] The same contention was advanced in the petition filed with this Court in the *U. S. Printing & Novelty Co., Inc.*, case, *supra* (Oct. Term, 1953, No. 273) and is made by petitioner in No. 484, this Term. And see the court of appeals' opinion in the *Lichtenstein* case, *supra*, 194 F. 2d at 610–611.

Congress, moreover, has approved the ruling in *Keppel* in taking pains to make clear that the Commission's power to deal with merchandising-through-gambling schemes is unaffected by criminal statutes which relate to gambling. Thus, in 1951, when Congress forbade the interstate transportation of slot machines and certain other mechanical devices suitable for gambling to states in which gambling is illegal (15 U. S. C. 1171 *et seq.*), it added the proviso (15 U. S. C. 1172): "Nothing in this act shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act." The Senate Report, explaining this provision, states (S. Rep. No. 1482, 81st Cong., 2d Sess., p. 4): "A saving clause is included in this section to avoid any misunderstanding that the act, and particularly the provision in section 2 permitting unbroken transportation of gambling devices into States where their use is legal, interferes with or reduces the authority which the Federal Trade Commission has exerted under section 5 of its constituent act (15 U. S. C. 45) to exclude from the channels of interstate commerce gambling devices to be used in the sale or distribution of merchandise to the public, *Federal Trade Commission* v. *R. F. Keppel & Bros., Inc.*, 291 U. S. 304; *Charles A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74."

To similar effect, see H. Rep. No. 2769, 81st Cong., 2d Sess., pp. 9–10. See, also, *Lichtenstein v. Federal Trade Commission, supra,* 194 F. 2d at 610–611.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
STANLEY N. BARNES,
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JANUARY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955